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No. 73-1869

In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER H. BEER, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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We have stated in our original brief the reasons why, in our view, the judgment of the district court should be affirmed. At the oral argument last Term, however, we expressed our disagreement with the district court's holding (as an alternative ground supporting its judgment) that the continued election of two members of the New Orleans City Council on an at-large basis would in itself violate Section 5 of the Voting Rights Act. The purpose of this supplemental brief on reargument of the case is to amplify the reasons for our disagreement with that holding.

The facts pertinent to this aspect of the case are that the City Council of New Orleans is a seven-member body of which five members are elected from single-member districts and two are elected at-large. In particular, the New Orleans Charter provides in one section (Sec. 3–102) that two members of the Council shall be elected at-large and five from districts (App. 15). The subsequent section (Sec. 3–103) specifies that the City shall be divided into five single-member councilmanic districts and requires the reapportionment of these five districts following each decennial census of the United States (App. 15–16). The at-large seats, accordingly, have existed in their current form under the present Charter since 1954 without being reconsidered in, or affected by, any intervening legislative enactment (see J.S. App. 4a n. 13, 66a).

Since, as the district court recognized (J.S. App. 29a, 66a), Section 5 applies only to changes in voting procedures occurring since November 1, 1964, it follows, in our view, that preclearance is not required under the Act for the continued existence and election of two at-large councilmen on the seven-member New Orleans City Council.

This situation is, we submit, significantly different from the question reserved in *Georgia* v. *United States*, 411 U.S. 526, 535 n. 7, concerning the status under Section 5 of new districts in a general reapportionment whose boundary lines and number of representatives (and proportion of the legislative body) coincide with those of old districts. It has been the

consistent position of the Attorney General, in administering the Act, that all the resulting districts in a general reapportionment or redistricting of a legislative body, including the newly adopted districts that coincide with the old, are covered by Section 5. We thus fully agree with the statement in the recent Senate Report on Section 5 (quoted on p. 8 of the Supplemental Brief for Appellees Jackson, *et al.*) that "[i]n some Section 5 cases, a change in the voting practice or procedure may also retain some features of the previous system, and all aspects of such a change are within the reach of Section 5." But in our view the district court's decision in the present case, on which the Committee Report relies for this legal proposition, involved a misapplication of this principle because the change at issue here did not include any reconsideration or readoption of the two at-large seats or any change in their status or voting strength on the seven-member City Council.

Accordingly, the judgment of the district court should be modified insofar as it holds that the continued existence of the two at-large seats in itself violates Section 5.[1] As so modified, the judgment should be affirmed since, for the reasons stated in our open-

[1] In the absence of such a modification, the Attorney General would be required by the district court's judgment to object to future redistrictings of the New Orleans City Council submitted to him for Section 5 preclearance if the two at-large seats were retained. Moreover, such a modification would make it possible for the City, if it wished, to proceed with a new election for the two at-large seats while the redistricting of the remaining five seats, and their preclearance, is still in process.

ing brief, the appellants' proposed redistricting of the five single-member districts, properly considered in the context of the district court's findings (including its findings concerning the two at-large seats [2]), would result in unjustified dilution of minority voting strength.

Respectfully submitted.

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[2] We question, however, whether the district court's present findings (which do not resolve the issue of alleged discriminatory purpose) support its conclusion that the at-large seats would violate Section 5 (assuming its applicability to them) even if the five districts were fairly drawn for purposes of the Act. In the absence of a racially discriminatory purpose, the Act does not (at least in a non-annexation context) preclude varied theories of political representation—including, for example, a mayor-council type of government in which the mayor has a substantial role in the legislative process. And see *Wallace* v. *House*, 515 F. 2d 619 (C.A. 5) (upholding against constitutional challenge a redistricting plan under which four aldermen would be elected from single-member districts and one would be elected at-large).

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